



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

TELECOMMUNICATIONS

IN THE MATTER OF THE
 IMPLEMENTATION OF THE FEDERAL
 COMMUNICATIONS COMMISSION'S
 TRIENNIAL REVIEW ORDER

)
)
)
)
)
)

PREHEARING ORDER

DOCKET NO. TO03090705

(SERVICE LIST ATTACHED)

BY THE BOARD:

On August 21, 2003, the Federal Communications Commission (FCC) issued its Triennial Review Order (TRO), which adopted new and revised rules aimed at promoting local telephone and broadband competition in CC Docket Nos. 01-338, 96-98, and 98-147. In its revised rules, individual States are charged with implementing vital aspects of the TRO related to the unbundling of the incumbent local exchange carrier's (ILEC) network pursuant to 47 U.S.C. § 251(c)(3).

The TRO, which became effective on October 2, 2003, requires state commissions to conduct a detailed analysis to determine whether competitive local exchange carriers (CLEC) are impaired without access to specific unbundled network elements (UNEs). If impairment is found, the UNE will continue to be unbundled at rates consistent with the FCC's Total Element Long Run Incremental Cost (TELRIC) methodology. The rules generally require State commissions to perform an analysis to determine if CLECs would be impaired under 47 U.S.C. § 252(d)(2)(B) without unbundled access to certain loops, transport, and local circuit switching.

The TRO establishes two separate tracks: one that must be concluded by States within 90 days and the other that must be concluded within nine months. In the TRO, the FCC determined that circuit switching for enterprise market customers no longer needs to be unbundled based on a presumptive finding of no impairment. States have 90 days, or until December 30, 2003, to rebut the national findings and to petition the FCC for a waiver if a more detailed geographic analysis reveals operational and economic barriers in particular markets. Numerous other issues must be resolved within nine months from the effective date of the FCC's TRO.

In order to meet the timeframes set forth in the FCC's TRO, the Board invited interested parties to file initial comments and seek intervention status no later than October 3, 2003, and to file

reply comments by October 10, 2003, on the issues contained in the FCC's TRO and the time frames within which each has to be addressed. In its Order dated September 24, 2003, the Board directed that comments be limited to the necessary steps that the Board needs to take to implement the TRO.

The Board's Order also directed the parties that wish the Board to seek a waiver of the FCC's rebuttable findings related to enterprise markets to file a formal petition with the Board no later than October 3, 2003. The Board's Order established that the petitions filed by the parties identify specific markets and provide detailed evidence to support the petitioner's contention that impairment exists within those markets consistent with the requirements in the FCC's TRO. Such proofs were to include, at a minimum, comprehensive customer-specific data including, but not limited to, the total number of customers served in New Jersey by the company at the DS1 or higher level in combination with ILEC unbundled switching, their geographic location and a comprehensive description of the impairment faced by the company in serving these customers without access to unbundled switching.

In addition, the Board also sought comment on the merit of reviewing issues from other Board decisions, which may be impacted by the implementation of the TRO contemporaneously with the TRO. Finally, the Board sought comment on whether existing Board rulings are impacted by the TRO and, if so, what, if any, action the Board should take with regard to such rulings.

On October 15, 2003, the Director of the Division of Telecommunications and the advising Deputy Attorney General convened a prehearing conference to identify issues for consideration by the Board and to establish a procedural schedule for the Board's consideration.

DISCUSSION

INTERVENOR AND PRO HAC VICE MOTIONS

The following entities have formally requested intervention status in the within matter: Allegiance Telecom, Inc., AT&T Communications of NJ, L.P. (AT&T), BridgeCom International/TruCom, Broadview Networks, BullsEye Telecom, InfoHighway Communications Corporation, McGraw Communications, Inc., Metropolitan Telecommunications, Inc. (MetTel), Talk America, Inc., Communications Workers of America, AFL-CIO (CWA), Conversent Communications of New Jersey, LLC, Covad Communications Company, MCI, Sprint Corporation, SNIIP LiNK, LLC, Verizon New Jersey, Inc. (VNJ), Z-Tel Communications (Z-Tel), XO New Jersey, Lightship Telecom, LLC. No party has opposed any motion. The Board **HEREBY GRANTS** each motion to intervene as filed.

On October 3, 2003, twelve entities filed initial comments (IC). Of those twelve, seven also supplied reply comments (RC) on October 10, 2003. In addition, the Board received eleven pro hac vice requests.¹ All of the affidavits filed with the Board on their behalf attest to their admittance in good standing to practice law in other jurisdictions. Furthermore, no disciplinary proceedings are pending against them in any other jurisdiction. All attorneys who have sought pro hac vice admission have submitted payment to New Jersey Lawyer's Fund for Client

¹ Philip S. Shapiro, AT&T Communications of NJ, L.P.; Charles C. Hunter and Catherine M. Hannan, BridgeCom International; Genevieve Morelli and Ross Buntrock of Kelley Drye & Warren LLP on behalf of, Broadview Networks, BullsEye Telecom, InfoHighway Communications Corporation, McGraw Communications, Inc., Metropolitan Telecommunications, Inc. (MetTel), Talk America; Alan M. Shoer, Conversent Communications of New Jersey, LLC; Chana W. Wilkerson, MCI; Zsuzsanna E. Benedek, Sprint; Steven Augustino, of Kelley Drye & Warren LLP on behalf of SNIIP LiNK, LLC; William B. Petersen, Verizon New Jersey Inc.; and Darius B. Withers, of Kelley Drye & Warren LLP on behalf of XO New Jersey.

Protection and Ethics Financial Committee as required by R. 1:20-1(b) and R. 1:28-2. All attorneys agree to abide by the applicable regulations and statutes. No party has opposed any of the requests. Therefore, having considered the material submitted in support of these motions, the Board **HEREBY GRANTS** the motions seeking *pro hac vice* admission of the attorneys listed herein subject to the following: The attorney shall:

- (1) Abide by applicable rules, including all disciplinary rules;
- (2) Consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the attorney or the attorney's firm that may arise out of the attorney's participation in the matter;
- (3) Notify the Board immediately of any matter affecting the attorney's standing at the bar of any other court; and
- (4) Have all pleadings, briefs and other papers filed with the Board signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted attorney therein.

90-DAY PROCEEDING

On October 3, 2003, the Board received a joint petition from BridgeCom International, Inc. (BridgeCom), InfoHighway Communications Corporation (InfoHighway), Manhattan Telecommunications Corporation and TruCom Corporation (TruCom) (Collectively referred to hereinafter as Joint Petitioners). In its Petition, the Joint Petitioners asked the Board to petition the FCC for a narrowly tailored waiver of its national findings that CLECs are not impaired without access to unbundled local switching for enterprise customers served with DS1 or higher loop facilities.² In doing so, the Joint Petitioners asked the Board to find that they "are impaired without access to [unbundled local switching] to serve their existing installed base of enterprise market customers as of October 2, 2003."³

In requesting the waiver, the Joint Petitioners acknowledge that in order for a state commission to petition the FCC for such a waiver, the Board would have to conduct a geographic analysis that yielded a determination that CLECs are impaired in a particular market due to economic and operational impairment. The Joint Petitioners stated that "the timeframe to prepare and present such a case far exceeds the 90-days allotted by the FCC."⁴

By letter dated October 9, 2003, the Joint Petitioners advised the Board that the Second Circuit Court of Appeals had issued a temporary administrative Stay of the 90-day requirements of the FCC's rules pending review on the merits of the motion that was initially filed on behalf of the Joint Petitioners. Because the majority of the appeal cases related to the FCC's TRO have been transferred to the Eighth Circuit Court and subsequently assigned to the United States Court of Appeals for the District of Columbia Circuit, some parties to the case question the validity of the temporary administrative stay issued by the Second Circuit Court. On October 3, 2003, the D.C. Circuit Court required that all relevant cases be transferred to it.

The comments that the Board received related to the 90-day proceeding generally addressed whether the Board should entertain a 90-day filing and the role the commenters would take in such a proceeding. Allegiance indicated in its initial comments that the Board should not rebut the FCC's national findings that enterprise customers are not impaired without access to

² Joint Petitioners at 1.

³ *Ibid.*

⁴ *Id.* at 2.

unbundled local switching.⁵ Both AT&T and Sprint (the CLEC) have indicated that they will not challenge the FCC's presumptive findings.⁶ However, AT&T, Sprint and Z-Tel stated that they will participate in a 90-day proceeding to the extent the outcome impacts any nine-month proceeding.⁷ They further caution the Board to limit any findings made in a 90-day proceeding to that proceeding alone and not to carry over to any aspect in the nine-month proceeding.⁸ In addition, if the Board makes clear its intention to develop market definitions for mass market local circuit switching in the nine-month proceeding, Sprint stated that it does not anticipate that it will participate in any 90-day proceeding initiated by another CLEC.⁹

In their collective comments, Broadview Networks, BullsEye Telecom, InfoHighway Communications, McGraw Communications, Metropolitan Telecommunications, Inc. and Talk America (Collectively Broadview et al.) noted that if a 90-day proceeding is conducted by the Board, it should be done separately from any other proceeding.¹⁰ In its comments, Verizon asked the Board to clarify its reference to the ninety-day proceeding in the context of parties that wish to contest the FCC's rebuttable findings related to enterprise markets to recognize that only the FCC can change those findings.¹¹

In reviewing the Joint Petitioner's filing the Ratepayer Advocate (RPA) has advised the Board that the Petition "on its face lacks adequate and sufficient support [to be considered by the Board]."¹² In its reply comments, VNJ concurs and avers that the Joint Petitioner's waiver request is not based on a legally or factually sufficient basis for a finding of impairment, but, rather on its view that the FCC committed an error by making a national finding of non-impairment for switching for DS1 enterprise customers and by imposing a 90-day time frame to rebut this finding.¹³

BridgeCom International, Inc. (BridgeCom) and TruCom Corporation (TruCom) (Joint Commenters) agreed in their joint comments with the Board's preliminary procedural schedule attached to the October 3, 2003 Order, but offered several suggestions which they believe would streamline the process making it more efficient by rescheduling the prehearing conference and eliminating the date scheduled for filing reply comments. In addition, the Joint Commenters recommend that the Board refrain from sending out discovery until the prehearing conference has been held.¹⁴

Pending a decision by a court of competent jurisdiction, with regard to the 90-day proceeding, the Board considers the temporary Stay valid and recognizes the temporary Stay granted by the Court of Appeals for the Second Circuit. During the prehearing conference the Joint Petitioners' attorneys acknowledged that they are aware of the risks associated with staying the 90-day proceeding pending a final determination by a court and are agreeable to a Stay of the Board's 90-day proceeding. Therefore, the Board will **HEREBY TEMPORARILY STAY** and toll the 90-day schedule pending a review of the merits of the Stay request by the Federal Courts.

It is Staff's expectation that the FCC would toll the clock on its December 30, 2003 deadline if the court reinstates the FCC's requirements pursuant to the TRO; thereby providing State commissions with an amount of time equivalent to the 90 days within which to render their

⁵ Allegiance IC at 2.

⁶ AT&T IC at 3, Sprint IC at 2.

⁷ AT&T IC at 3, Sprint IC at 2, Z-Tel IC at 9.

⁸ *Ibid.*

⁹ Sprint IC at 2-3.

¹⁰ Broadview et al. IC at 4.

¹¹ VNJ IC at 2, footnote omitted.

¹² RPA RC at 4.

¹³ VNJ RC at 3.

¹⁴ Joint Commenters at 3.

findings. The herein determination to temporarily stay our schedule is in no way based upon the merits of the filing. In fact, it is Board Staff's opinion that the Petition pending before the Board is deficient and absent curing the filing within seven days of the date of this Order, Staff will recommend at a future Board meeting that the Board dismiss the Petition filed on October 3, 2003, on behalf of the Joint Petitioners.

NINE-MONTH PROCEEDING

Unlike the FCC's presumptive finding of no impairment for enterprise market switching, the FCC affirmatively found that CLECs are impaired without access to certain unbundled network elements available from ILECs. However, in arriving at its decision the FCC also recognized that in certain markets or geographic areas those barriers may not be present and therefore parties should have an opportunity to challenge the FCC's findings based upon specifically defined criteria for access to unbundled local switching for mass market customers, high capacity loops (dark fiber, DS3 loops and DS1 loops) and dedicated transport (DS1, DS3 and dark fiber).

Pursuant to the FCC's TRO, state commissions must make a determination within nine months of the effective date of the FCC's Order. In order to meet the FCC's aggressive time frames, the Board sought comment from interested parties on the necessary steps that the Board should take to meet the nine-month deadline. The commenters generally agreed with the procedural tasks before the Board. However, they had varying positions on precisely how the Board should achieve its objective. Several parties suggested that the Board bifurcate its proceeding into two or more separate proceedings dealing independently with mass market switching, loops and transport, hot cuts or some combination of the above.¹⁵ Several other commenters suggested that the procedural schedule be modified to allow for the market definition to be established prior to initiating the potential impairment phase of the proceeding, while others sought further schedule modifications to accommodate more or less time for discovery, filing of testimony, summary disposition, etc.¹⁶

According to AT&T, VNJ should be required to specify where it intends to challenge the FCC's nationwide finding of non-impairment, and to present its *prima facie* case.¹⁷ Specifically, AT&T suggested that VNJ should be required to identify those market areas¹⁸, transport routes, and

¹⁵ BridgeCom and TruCom recommend that the nine-month proceeding be conducted as three separate tracks – one addressing mass market unbundled local circuit switching, one dealing with high capacity loops and dedicated transport, and one dedicated to the "batch-cut migration process". Joint Commenters at 3, see also RPA IC at 29-30.

¹⁶ See, Allegiance IC at 4-5, Conversent IC at 26, Sprint IC at 4, and VNJ at 4.

¹⁷ MCI also recommended that any party seeking to challenge the impairment related to high-capacity loops be required to make a *prima facie* filing including evidence, testimony and exhibits. In addition, MCI would require three charts related to the FCC's trigger mechanism and potential deployment and various procedural changes to permit comment by the parties on the evidence presented. MCI offers similar suggestions for dedicated transport. MCI IC at 4-9. The RPA submitted that the party challenging the presumption of impairment has the burden of going forward to show a *prima facie* case and then must show by the preponderance of the evidence that the triggers are satisfied in the respective wire center. RPA IC at 33. Like the RPA, Sprint recommends that the party rebutting the FCC's national findings of impairment bear both the initial burden of production (*i.e.*, that party must come forward initially with facts and evidence of non-impairment) and the burden of proof in ultimately establishing non-impairment. Sprint IC at 4.

¹⁸ With regard to market definition, AT&T noted that all other factual questions regarding local switching for mass market customers will be inseparably intertwined with its investigation of the definition of the relevant geographic markets within New Jersey and requires a review of how the full range of operational and economic impairment issues might vary across the State. *Id.* at 9-10. Sprint suggests that the Board revise its schedule and define the market for mass market switching upfront; however, the company notes that it is not an absolute prerequisite. Sprint IC at 3-4. MCI argued that the market definition should only be made at the end of the case after considering the entire factual record. MCI IC at 17.

customer locations in which it intends to seek non-impairment determinations for local switching, transport, and loops.¹⁹ In addition to identifying the specific proposed markets, routes and customer locations, AT&T maintained that VNJ should also include in its initial filing the basic evidence that it proffers to support that challenge. According to the company, only after the scope of VNJ's challenge to the FCC's nationwide finding of non-impairment is clear will a CLEC be able to present a meaningful rebuttal case.²⁰

AT&T further recommended that VNJ should notify the parties of its intent to invoke the local switching triggers established by the FCC or whether it intends to challenge the national finding of impairment without access to unbundled local switching for mass market customers.²¹ In their joint comments BridgeCom and TruCom request that VNJ submit a statement identifying specific geographic areas within the State where it believes that the competitive triggers have been met for mass market switching.²²

As a general matter, Sprint stated in its comments that it's New Jersey-based ILEC, United Telephone Company of New Jersey, Inc. (United), will not seek to rebut national impairment findings concerning its loops, transport and local circuit switching relative to the State of New Jersey. However, it observed that depending upon how the Board defines the market, (as to include United's local territory) and whether an impairment determination is made, Sprint and United reserved the right to rebut those findings and the national findings.²³

In considering the criteria for determining whether CLECs are impaired in certain markets without unbundled access to ILEC facilities, VNJ urged the Board to pay particular attention to the triggers established by the FCC for each of the core issues²⁴ and to avoid the use of subjective operational and economic impairment measures if the initial trigger analysis results in a finding of non-impairment.²⁵ Although the parties generally disagree with VNJ on the extent of the analysis required to find impairment, VNJ has acknowledged that it has the burden of proving its case and therefore has the responsibility of defining the initial parameters for such key elements as market definition which would then be subject to challenge by the parties and brought to the Board for final resolution.²⁶

DISCOVERY AND INFORMATION REQUESTS

Many of the parties have indicated that given the short timeframes for cases to be presented and for the Board to act, it would be advisable to streamline the discovery process.²⁷ In order to accomplish this, the parties have proposed specific questions or point to discovery that has been developed by other states or in connection with the Triennial Review Implementation Project Task Force (TRIP), as models that can be used in New Jersey. Some parties suggest that the Board be solely responsible for propounding discovery while others recommend that the initial phase be propounded by Staff, followed by more traditional party-to-party discovery to supplement questions already asked and to permit the parties an opportunity to propound discovery on the *prima facie* case to be filed by VNJ. Everyone agrees, however, that a

¹⁹ Allegiance requests that the Board limit its evaluation of loop and transport issues to those specific routes identified by VNJ. Allegiance IC at 5.

²⁰ AT&T IC at 5.

²¹ *Id.* at 5, 7.

²² Joint Commenters IC at 4.

²³ Sprint IC at 3.

²⁴ VNJ IC at 4.

²⁵ *Id.* at 6.

²⁶ *Ibid.*

²⁷ Allegiance IC at 6, AT&T IC at 30, Conversent IC at 23, MCI IC at 10 Sprint IC at 4, VNJ at 4.

streamlining of the discovery process is both efficient and necessary given the tight timeframes in which the Board is required to adjudicate these complex issues.

In accordance with the discussion of all parties during the prehearing conference and the desire of the parties, as well as the Board, to provide an efficient, streamlined process which in light of the time constraints, minimizes the issuance of repetitive requests by multiple parties, the Board **HEREBY DIRECTS** Staff to initiate the discovery process by propounding an initial round of discovery by October 27, 2003. No other party is foreclosed or precluded from propounding additional discovery. The Board **DIRECTS** that the parties not engage in repetitious discovery requests. The procedural schedule set forth as an attachment to this Order takes into consideration the comments of all parties and provides a guideline for efficient management of this case in light of the tight time frames set by the FCC. Parties will be permitted to propound discovery and information requests anytime after receiving and reviewing Staff's initial questions. However, discovery and information responses by all parties served shall still be governed by the dates set forth in the schedule that is attached to this Order.

CONFIDENTIALITY ISSUES

Due to the sensitive nature of the discovery required to address the operational and economic impairment faced by CLECs, the parties are jointly working on a proprietary agreement and have requested that the Board issue a Protective Order narrowly identifying specific data and information that will receive protected status.

The Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., which amended the former Right to Know Law concerning the public's access to government records, became effective on July 8, 2002. One of the modifications includes an expansion of the definition of a government record from only those documents required to be made, maintained or kept on file by law, to information received, made, maintained or kept on file by a public agency in the course of its official business, except for advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. The statute goes on to list information which shall not be included in the definition of a government record and shall be deemed confidential, including trade secrets, proprietary commercial or financial information, information which, if disclosed, would give an advantage to competitors, and security information for a building or facility which, if disclosed, could jeopardize the security of the infrastructure or persons therein.

OPRA also changed procedures regarding government records by setting forth new format and timing requirements for making and responding to requests for access. As a result, many public agencies proposed new rules and regulations to redesign their record request operations in compliance with OPRA. The proposed new rules of the Board of Public Utilities appeared in the July 1, 2002 New Jersey Register, and were adopted in the July 21, 2003 publication of the New Jersey Register.

As part of the new procedures established concerning the public's access to its records and for claimants asserting confidentiality claims, the Board authorized its custodian of records to determine whether information requested by the public is a government record within the meaning of OPRA or is confidential N.J.A.C.14:1-12.6. Additionally, the Board reserved its authority to make a confidentiality determination when appropriate:

Nothing herein shall limit the Board's authority to make a confidentiality determination within the context of a hearing or other proceeding or with regard to any other matter, as the Board may deem appropriate.

[N.J.A.C. 14:1-12.6(d).]

Accordingly, the Board may make confidentiality determinations regarding information gathered in proceedings such as the within matter.

The unique analysis required of the Board in implementing the FCC's TRO necessitates the identification of specific narrow categories of information anticipated to be exchanged in the context of this proceeding as protected and deemed non-governmental documents pursuant to OPRA. In the context of analyzing impairment in mass market switching, loops and transport, specific information will be sought from the intervenors in this proceeding as well as from all carriers authorized by the Board to provide facilities-based services in the State. Although much of the information sought will not be confidential, the nature of some information and data is particularly sensitive. Specifically, (1) the exact geographic location of a carrier's facilities; (2) customer identification, location and services to the extent not otherwise publicly available; and (3) business plans and structure of a carrier's network are all information that the Board hereby recognizes as deserving protection in the context of this proceeding. The release of the above-described information could provide an unfair advantage to competitors because it is commercially sensitive or contains proprietary financial information that could be used by competitors to the detriment of the provider. Furthermore, the exact geographic location of a carrier's facilities and infrastructure to the extent not otherwise publicly available, could jeopardize the security of such facilities and infrastructure and, in turn, the security of persons utilizing such facilities and infrastructure and materially increase the risk or consequence of potential acts of sabotage or terrorism. The Board **HEREBY FINDS** and **CONCLUDES** that the specific information described above would provide an advantage to competitors, is proprietary commercial and financial information, or raises particular security concerns and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for the particular information described above be made to the Board's custodian, the Board **DIRECTS** that such information be treated as confidential and deny all requests for access.

The Board emphasizes that only these limited categories are hereby designated in this proceeding as not governmental records pursuant to OPRA. All other information exchanged in the context of this case shall be governed by the Agreement of Non-Disclosure of Information Claimed to be Confidential, which shall be in accordance with the regulations and statutes governing confidentiality in New Jersey. With the exception of the narrow areas carved out above as exceptions to OPRA and granted protected status herein, the regulations governing the conduct of the administrative case, including filing requirements for information exchanged in the context of the discovery process should be followed as set forth in the Confidentiality Agreement and the applicable regulations and statutes cited above.

HOT CUTS

In the FCC's TRO, it specifically directed states to approve a batch hot cut process to address both the costs and timeliness of the hot cut process. The FCC found in its TRO that a batch hot cut process is essential to achieving true facilities-based competition. In its September 13, 2002 Order on Reconsideration, the Board also recognized the role that hot cuts play in transitioning customers over to CLEC facilities when it approved VNJ's promotional hot cut rate and advised the company that it would revisit the hot cut issue six months prior to the expiration of the promotional hot cut rate and investigate whether automation of hot cuts is possible. Several parties noted the Board's language in the September 13, 2002 Order regarding hot cuts and provided additional comments on how best to implement the FCC's batch hot cut ruling. Allegiance urged the Board to merge the investigation of the pricing of individual hot cuts and automation of the hot cut process into the nine-month proceeding and to extend the promotional

hot cut rate to the end of the proceeding. AT&T asked the Board to monitor and incorporate the batch hot cut process determinations made by the New York Public Service Commission in its on-going proceeding or consider using a third-party consultant.²⁸

Broadview et al. suggested that the Board develop a separate and distinct proceeding or phase of an omnibus proceeding to address batch hot cuts, while MCI urged the Board to resolve this issue by March 5, 2004, when the existing hot cut rate is scheduled to expire by initiating a collaborative session separate from the nine-month proceeding. In an earlier letter dated September 17, 2003, the RPA recommended that the Board address the hot cut issue as part of the nine-month TRO proceeding and extend the \$35 promotional rate subject to true-up and refund.

PREHEARING CONFERENCE

On October 15, 2003, interested parties attended a prehearing conference to discuss procedural issues where Board Staff addressed many of the parties' concerns raised in their comments. The procedural schedule was revised to take into account the parties' concerns related to the timing of initial discovery questions that will be served upon both VNJ and the CLECs. The parties were also asked to provide further comment on other aspects of the schedule. During the prehearing conference the parties generally agreed that initial standardized discovery questions would be propounded by Staff. The parties were asked to provide specific comment on discovery questions that have been prepared by other states or organizations. In addition, the Attorney General's Office circulated a proprietary agreement for the parties' review, which will be used to assure confidentiality of certain data.

In response to the parties' concerns that were raised regarding the early identification of the geographic markets that VNJ intends to use in its analysis and the identification of customer specific locations for high capacity loops and specific routes for dedicated transport, VNJ agreed to file its *prima facie* case on December 3, 2003. The early filing of VNJ's case will eliminate most concerns that the parties have raised regarding identification of the markets used in the mass market switching phase of the nine-month proceeding and reduce the speculation in preparing a rebuttal case on issues related to customer locations for high capacity loops and route-specific data for dedicated transport. With the early filing in hand, the parties will be able to submit additional targeted discovery questions, testimony and prepare their rebuttal cases.

ADDITIONAL FINDINGS AND DIRECTIVES

Based upon the foregoing, the Board **DIRECTS** VNJ to file its *prima facie* case no later than December 3, 2003. The filing must affirmatively set forth the company's challenge of impairment relative to mass market switching, high capacity loops and dedicated transport. For mass market switching the company must, at a minimum, clearly identify the markets in which it seeks a finding of non-impairment consistent with the FCC's requirements in its TRO and provide meaningful data to support the company's contention. Identification of the markets must include a clear articulation of the market definition and the relevant geographic area that the company uses in its analysis. In addition, it must clearly identify the demarcation point between the mass and enterprise markets.

If the company believes that any of the FCC triggers have been satisfied, it must, at a minimum, specifically and unambiguously identify each trigger and identify the carriers that VNJ believes meet the requirements of the rule. If the company is claiming that a trigger has been satisfied, it

²⁸ Allegiance IC at 7, AT&T IC at 21, Broadview et al. at 2, Conversent IC at 30, MCI IC at 18, RPA IC at 29, VNJ IC at 8.

must also provide both the quantified and qualitative data that it relied upon in reaching its conclusion.

In support of its analysis, VNJ must provide all supporting documentation and work papers in both hard copy and electronic form. The data must be provided and presented in a fashion that will permit the Board and other parties to re-state the defined market using the company-provided data in a manner that will permit the aggregation or dis-aggregation of data.

We note that in our September 29, 1999 Summary Order, the Board stated that we would initiate a review of the UNE-P to evaluate the status of the platform. However, since the release of the FCC's TRO, the future of UNE-P is dictated by that decision, rendering moot a separate review of UNE-P. Given the fact that unbundled switching is an integral part of UNE-P, the findings related to unbundled switching in this proceeding should determine the availability and scope of UNE-P.

With respect to the high capacity loops and dedicated transport, VNJ must identify each customer location (for high capacity loops) and each individual transport route where VNJ challenges the FCC's nationwide finding of impairment, identify the specific trigger or triggers that it contends are satisfied for each customer location or transport route, identify the UNE (DS1, DS3 or dark fiber) for which it contends that each trigger is satisfied for the customer location or transport route, identify the carriers it contends qualify for satisfaction of each trigger for the customer locations and transport routes and provide any other evidence on which the company intends to rely in its *prima facie* case to demonstrate non-impairment. If the company intends to bring a "potential deployment" case in the nine-month proceeding, the company must affirmatively state its intentions and provide a detailed basis for doing so.

In their comments, the parties generally agreed that disposition of the batch hot process envisioned by the FCC is vital to the continued success of local competition envisioned by both the Board and the FCC. While the parties differed somewhat on how the batch hot cut process should be implemented and whether the Board's review of the existing promotional hot cut rate and review of automating the entire hot cut process should run parallel to the nine-month proceeding, one thing is agreed upon: a meaningful hot cut procedure must be put in place to ensure that competitors gain timely and efficient access to unbundled loops. Because the hot cut issue is vital to facilities-based competition, we agree with the parties who suggest that it should be addressed separately from the other nine-month issues, i.e., mass market switching, high capacity loops and dedicated transport. The Board **HEREBY FINDS** that there are enough common issues of fact and law to VNJ's promotional "single" hot cut review and the review that will need to be undertaken to develop a batch hot cut to consolidate the two issues. The combination of the two issues will permit the parties to focus their efforts on resolving two similar issues simultaneously and will permit the Board to institute new single hot cut and batch cut procedures and rates by the expiration of VNJ's promotional offering in March 2004. In order to accomplish this, the Board **HEREBY FINDS** that a separate proceeding should be commenced in a collaborative technical workshop format limited to technical subject matter experts that will investigate the feasibility of automating hot cuts as envisioned by the Board's Order on Reconsideration and to develop a batch hot cut process as required by the FCC. The Board **HEREBY DIRECTS** the parties to convene an initial meeting by November 3, 2003 to define the parameters of the collaborative and establish a schedule that results in the implementation of both a batch hot cut procedure and rate and single hot cut procedure and rate no later than March 5, 2004. In order to achieve this goal, VNJ is **HEREBY DIRECTED** to file its rate and cost information for both of the aforementioned hot cut processes with the Board, with copies to the parties, by no later than December 10, 2003.

The Board also **HEREBY APPROVES** the attached procedural schedule that takes into account Staff's recommendation based upon the comments of the parties and the discussions presented at the prehearing conference on October 15, 2003. The Board also recognizes that certain schedule modifications may be necessary. As such, the Presiding Commissioner, in consultation with the President of the Board, will be vested with the authority to revise the schedule as may be necessary.

ORDERING CLAUSES

In sum, the Board, after careful consideration of the issues raised in this matter concludes and Orders the following:

- (1) The Board **HEREBY TEMPORARILY STAYS** the 90 day schedule in this matter, until such time as the Federal Courts decide the merits of the Motion for a stay of the portion of the FCC's Order regarding access to unbundled local switching for enterprise customers served by DS1 or higher loop facilities;
- (2) The Board **DIRECTS** Staff to propound discovery upon the parties by October 27, 2003;
- (3) The Board **FINDS** that information submitted as part of the record in this proceeding pertaining, to (1) the geographic location of a carriers facilities; (2) customer identification, location and services and (3) business plans and structure of a carrier's network are afforded proprietary treatment;
- (4) The Board **ORDERS** VNJ to file its *prima facie* case as described within the body of this order on or before December 3, 2003;
- (5) The Board **ORDERS** the consolidation of the single hot cut proceeding and batch hot cut proceeding;
- (6) The Board **ORDERS** a separate proceeding in the form of a collaborative technical workshop initiated by staff to investigate the appropriateness of automation of the hot cut process and batch hot cut process, to commence November 3, 2003;
- (7) The Board **ORDERS** VNJ to file with the Board rate and cost information concerning single and batch hot cut processes on or before December 10, 2003;
- (8) The Board **APPROVES** the procedural schedule set forth herein and authorizes the Presiding Officer the authority to revise the schedule in this proceeding as needed, in consultation with the President of the Board; and

(9) The Board **HEREBY GRANTS** the motions for Intervention and pro
hac vice as detailed within this Order.

DATED: October 28, 2003

BOARD OF PUBLIC UTILITIES
BY:

(SIGNED)

JEANNE M. FOX
PRESIDENT

(SIGNED)

FREDERICK F. BUTLER
COMMISSIONER

(SIGNED)

CAROL J. MURPHY
COMMISSIONER

(SIGNED)

CONNIE O. HUGHES
COMMISSIONER

(SIGNED)

JACK ALTER
COMMISSIONER

ATTEST:

(SIGNED)

KRISTI IZZO
SECRETARY

NINE MONTH SCHEDULE

Board Initiates Review.	09/24/2003
9 Month Process Begins	10/02/2003
Comments Due	10/03/2003
Requests for Intervention Due.....	10/03/2003
Reply Comments Due.....	10/10/2003
Pre-Hearing Conference	10/15/2003
Board Decision on Pre-Hearing Order.....	10/22/2003
Staff Discovery Served.....	10/27/2003
Staff Discovery Responses Due.....	11/12/2003
Discovery By Parties Served	11/26/2003
Verizon Prima Facie Case with Initial Testimony.....	12/03/2003
Discovery Responses to Parties	12/15/2003
Discovery on Verizon Prima Facie Case.....	12/17/2003
Verizon Discovery Responses Due.....	01/12/2004
Rebuttal Testimony	02/02/2004
Discovery on Rebuttal Testimony Served.....	02/09/2004
Discovery Responses on Rebuttal Testimony	02/19/2004
Surrebuttal Testimony	02/26/2004 (Noon)
Hearings Begin	03/03/2004
Hearings End.	03/26/2004
Initial Briefs Due.....	04/21/2004
Reply Briefs Due	05/10/2004
Final Order Due	07/02/2004